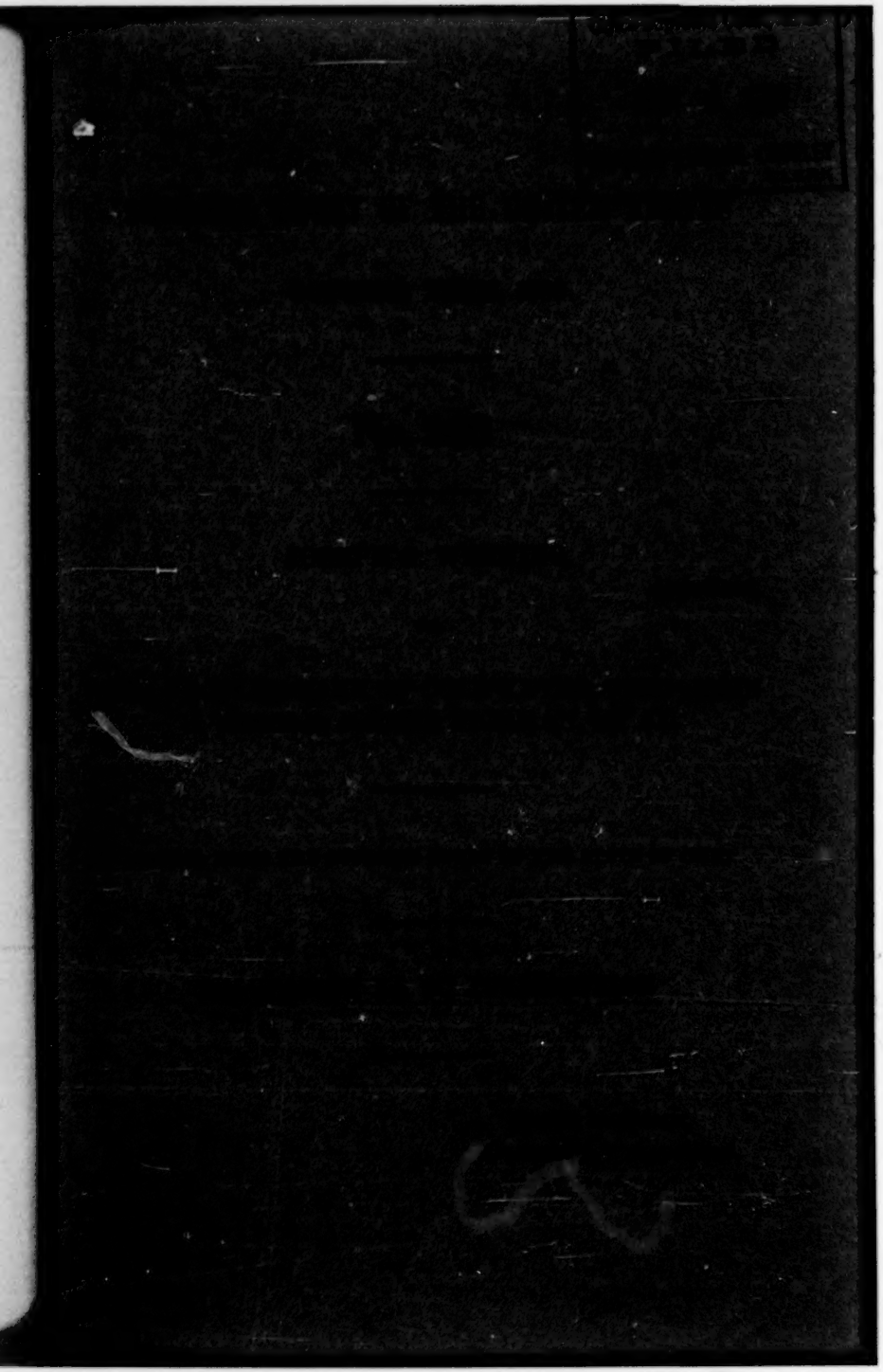


INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Statutes the validity of which is involved	2
Date of judgment and date of application for appeal	5
Nature of the case and rulings below which bring the case within the jurisdictional provisions relied upon	5
Cases sustaining the jurisdiction of the Supreme Court of the United States	8
The questions involved are substantial	10
How the federal questions were raised	13

Table of Cases Cited

Ableman v. *Booth*, 21 Howard 506	12
Aspen v. *Billings*, 150 U. S. 31	8
Davis v. *Packard*, 8 Peters 312	11
Giboney v. *Empire*, 336 U. S. 490	9
Greene v. *Neal*, 6 Peters 291	13
Gypsy v. *Escoe*, 275 U. S. 498	8
Harkrader v. *Wadley*, 172 U. S. 148	12
Heff, In the matter of, 197 U. S. 488	12
Hetrick v. *Lindsey*, 265 U. S. 384	9
Kalb v. *Feuerstein*, 308 U. S. 433	3, 7, 9, 11, 13
McCullough v. *Maryland*, 4 Wheaton 316	9
Martin v. *Struthers*, 319 U. S. 141	9
Mathews v. *Huwe*, 269 U. S. 262	9
Missouri v. *Andriano*, 138 U. S. 496	12
Murdock v. *Memphis*, 20 Wallace 590	9
Van Huffel v. *Harkelrode*, 284 U. S. 225	10
Wheeling v. *Glander*, 337 U. S. 502	10
Zucht v. *King*, 260 U. S. 174	11

Statutes Cited

	Page
Bankruptcy Act, Chapter VIII, Section 75	6
Constitution of the United States:	
Article I, Sec. 8, Clause 4	9
Article VI	9
14th Amendment	10
General Code of Ohio:	
Section 11588	4, 7
Section 11688	4, 7, 16
Section 11690	5, 7, 16
Judicial Code, Section 237a, 29 U.S.C. 1257(1)	1, 10
Laws of Ohio:	
Volume 115, Part 2, page 327	4
Volume 116, p. 10	4
Volume 117, p. 83	4
United States Code:	
Title 11, Section 203	2, 6, 10, 15
Title 28, Section 1257	1
Title 28, Section 2101	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 293

JOSEPH G. WENNING,

Appellant,

vs.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGLE, JOSEPH PLEIMAN, GEORGE FRONING, EMMA FRONING, LAWRENCE M. DAVIS, RALPH J. AHLERS, THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT; THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF HARTFORD, CONNECTICUT

STATEMENT IN SUPPORT OF JURISDICTION

A

The statutory provision which sustains the Jurisdiction of the Supreme Court of the United States is Title 28 USC, section 1257, which as here pertinent to this petition for appeal, reads as follows:

Section 1257. State Court; appeal:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision in favor of its validity."

B

Statutes the Validity of Which Is Involved

STATUTE OF THE UNITED STATES

The statute of the United States which is drawn in question and the validity of which was denied by the judgment below, said judgments being against its validity, is 11 USC, section 203. The pertinent provisions thereof are:

11 USC, section 203 (c), ed. of 1934:

"(c) At any time within five years after March 3, 1933, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debt."

11 USC, section 203 (n) ed. of 1934 (effective March 3, 1933):

"(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located to the exclusive jurisdiction of the court." . . .

11 USC, section 203 (n), Supplement III, ed. of 1934, (effective August 28, 1935):

"(n) The filing of a petition" . . . "praying for relief under this section, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property," . . .

11 USC, section 203 (o), ed. of 1934:

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt, or account, including any money demand;

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, recission, or specific performance of an agreement for sale of land or for recovery of possession of land;

(3) Proceedings to acquire title to land by virtue of any tax sale:

(4) Proceedings by way of execution, attachment, or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

11 USC, section 203 (p), Supplement III, ed. of 1934, as applied by the Court in *Kalb* v. *Feuerstein*, 308 U. S. 433, to a petition filed in a United States Court under said section 203 on precisely the same date, October 2, 1934, as the petition of this appellant, Joseph G. Wenning, was filed in a United States Court under the same section:

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or

under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in this section."

Prior to August 28, 1935, the above subsection (p) had read in 11 USC, section 203 (p), ed. of 1934, as follows:

"(p) The prohibitions of subdivision (o) shall not apply to proceedings for the collection of taxes, or interest or penalties with respect thereto, nor to proceedings affecting solely property other than that used in farming operations or comprising the home or household effects of the farmer or his family."

STATUTES OF OHIO

General Code of Ohio, section 11588; Laws of Ohio, Volume 115, Part 2, page 327; Volume 116, page 10; Volume 117, page 83, also found in Throckmorton's Ohio Code, 1948 Edition, at page 460, has so far as the following quotation is concerned) which is the only pertinent part for this appeal) at all times read as follows:

"When a mortgage is foreclosed or a specific lien is enforced, a sale of the property shall be ordered."

General Code of Ohio, section 11688, Throckmorton's Ohio Code, 1948 edition, page 498:

"11688. Confirmation and order for deed.—Upon the return of any writ of execution for the satisfaction of which lands and tenements have been sold, on careful examination of the proceedings of the officer, if the court finds that the sale was made, in all respects, in conformity to the provisions of this title, it shall direct the clerk to make an entry of the journal that the court is satisfied of the legality of such sale, and that the officer make to the purchaser a deed for the lands and tenements. (R.S. 5398.)"

General Code of Ohio, section 11690, Throckmorton's Ohio Code, 1948 edition, page 499.

> "11690. Judgment debtor may redeem any time before confirmation.—In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale." . . .

C

Date of Judgment and Date of Application for Appeal

The date of the judgment of the Supreme Court of the State of Ohio of which a review is now sought was March 22, 1950. The appellant's Motion for Rehearing was denied on April 12, 1950, whereupon said judgment was finally entered. The time for taking this appeal began to run April 12, 1950, when the rehearing was denied.

The date of the presentation of this application for appeal is July 7th, 1950.

Title 28 USC, section 2101(c), provides that this appeal shall be applied for within ninety days after the entry of the judgment appealed from. This application is filed within that period.

D

Nature of the Case and Rulings Below Which Bring the Case Within the Jurisdictional Provisions Relied upon

On February 28, 1949, the appellant filed his Second Amended Petition (uniformly referred to as Petition) in the cause out of which this appeal stems, that is, case number 13503 in the Common Pleas Court of Mercer County, Ohio, in which he sued the presumed purchasers of his real estate and their grantees, the sheriff and the deputy who presumed to sell his real estate in foreclosure, and their sureties seeking cancellation of certain deeds of conveyance which had purported to convey title to his real estate out of him by

authority of proceedings in a preceding foreclosure action in the same Court in case number 12534. He sought also accounting from the respective grantees under such deeds for rents and profits and for damages and other relief.

The real estate involved in said case number 13503 which developed into this appeal and that involved in the preceding foreclosure case number 12534 was the same real estate which he had while the foreclosure action was pending in case 12534, subjected to the sole jurisdiction of the United States Court by filing his petition under Title 11 USC, section 203. This United States Statute is commonly known as the farmer debtor law and being section 75 of Chapter VIII of the Bankruptcy Act entitled, "Proceedings for the Relief of Debtors" which contains other debtor provisions for railroads, corporations, etc.

That United States statute, Title 11 USC, Section 203, has been adjudicated in more than a score of cases in the Supreme Court of the United States, particularly in *Kalb* v. *Feuerstein*, 308 U. S. 433, wherein it was held that upon the filing of a petition by a farmer debtor under said United States statute, sections 203(n), 203(o), and 203(p) thereof automatically and peremptorily deprived a state court, its officers and agents of all power and jurisdiction in any foreclosure action then pending to continue or maintain such foreclosure action in any manner and made any attempt by judge, sheriff or mortgagee to maintain such foreclosure action in contravention of such statute subject to collateral attack.

The validity of this statute of the United States under the Constitution of the United States, and the validity of the statutes of the State of Ohio, authorizing and controlling foreclosures proceedings as repugnant to the law and Constitution of the United States were fully argued in the said Common Pleas Court where the case number 13503 originated. The decision of the Common Pleas Court was

against the validity of the United States statute and in favor of the state statutes.

The Memorandum (opinion) of the Judge of the Common Pleas Court rested the decision and judgment of the court solely upon the validity of the state laws, especially General Code sections 11588, 11688 and 11690 and the inapplicability of the United States statute, holding that even if the state court foreclosure proceedings violated the United States statute, the error was merely voidable and not subject to collateral attack, which was precisely what the Supreme Court of Wisconsin held in the case which was reversed in *Kalb* v. *Feuerstein*, 308 U. S. 433. The judgment denied the petition *in toto* without considering any of the other matters of accounting, damages, etc. The appellant filed and argued two motions seeking reformation of the decision and judgment of the Common Pleas Court, setting up the question of the validity of the Ohio statutes controlling foreclosures and the validity and applicability of the United States statute and Constitutional provisions, were denied.

The appellant appealed to the Court of Appeals of Ohio for Mercer County assigning as error that the judgment violated the Constitution of the United States and the laws passed in pursuance thereof, that the judgment was contrary to law and was not sustained by the evidence.

The United States statute and the United States Constitutional provisions sustaining it and the invalidity of the Ohio statutes were fully argued in the State Court of Appeals. That court in its holding and judgment affirmed the Common Pleas Court, holding that the proceedings and acts of the lower court were merely ministerial acts not inhibited, prohibited or precluded by the filing of the appellant's petition in the United States Court, and furthermore even if the acts which were performed in the Common Pleas Court *were wholly void* the Common Pleas Court could later make them lawful and operative and such later action of the

Court was not void but *voidable* and not subject to collateral attack. This judgment of the Court of Appeals was based entirely upon the question of the validity of the State laws which the appellant had drawn in question as repugnant to the Constitution of the United States and were held valid, and upon the question of the validity of the United States statute which the appellant had drawn in question and the decision was against its validity.

Thereupon the appellant appealed to the Supreme Court of the State of Ohio by filing his motion to certify and also his appeal as of right upon the ground that a Federal Constitutional question was involved. The motion to certify and the appeal as of right were briefed and argued in the Ohio Supreme Court raising the same questions and drawing in question the validity of the law and Constitution of the United States. The Supreme Court of the State of Ohio on March 22, 1950, overruled the motion to certify and dismissed the appeal as of right without any opinion, and on April 12, 1950 denied appellant's Application for Rehearing thus making its entry of judgment final and in effect rendering its decision in favor of the the validity of the state laws and against the validity of the statute and Constitution of the United States.

E

Cases Sustaining the Jurisdiction of the Supreme Court of the United States

1. That the period for presenting application for appeal begins with the denial of a rehearing: *Aspen* v. *Billings,* 150 U. S. 31, 36; *Gypsy* v. *Escoe,* 275 U. S. 498, and a long series of decisions uniformly in accord.

2. That appeal is to be taken from the Supreme Court of the State of Ohio and not from the Court of Appeals of Ohio when the Supreme Court of Ohio dismisses an appeal

as of right on a Constitutional question and denies a motion to certify is settled by decisions of the Supreme Court of the United States in several appeals from Ohio: *Mathews* v. *Huwe*, 269 U. S. 262; *Hetrick* v. *Lindsey*, 265 U. S. 384, both opinions by Chief Justice Taft of Ohio; and *Van Huffel* v. *Harkelrode*, 284 U. S. 225, opinion by Justice Brandeis, citing the Taft opinion; *Martin* v. *Struthers*, 319 U. S. 141.

3. That a decision of a state Supreme Court holding that proceedings conducted in a state court while a petition under Title 11 USC, section 203, is filed in a United States Court are not void but voidable and not subject to collateral attack is within the jurisdiction of the United States Supreme Court on appeal: *Kalb* v. *Feuerstein*, 308 U. S. 433.

4. That a decision of a state court holding that a state statute or municipal ordinance of a state does not violate a United States law or the United States Constitution therein drawn in question is subject to the jurisdiction of the United States Supreme Court on appeal: *Martin* v. *Struthers*, 319 U. S. 141; *Giboney* v. *Empire*, 336 U. S. 490.

5. That a decision of a state court holding that state statutes governing foreclosure in state courts are not automatically and peremptorily nullified by a United States Statute enacted pursuant to Article I, Section 8, Fourth Clause granting to the Congress power to legislate on the subject of bankruptcies is within the jurisdiction of the Supreme Court of the United States on appeal: *Kalb* v. *Feuerstein*, 308 U. S. 433.

6. That a state court decision holding that a state law is valid against a statute of the United States pursuant to the Constitution of the United States, thereby drawing in question Article VI, is within the jurisdiction of the United States Supreme Court on appeal: *McCullough* v. *Maryland*, 4 Wheaton (U. S.) 316.

7. That a state court decision holding that a state law is valid against the Fourteenth Amendment, thus drawn in question, is within the jurisdiction of the United States Supreme Court on appeal: *Wheeling* v. *Glander*, 337 U. S. 502.

8. In discussing the provision of the Judicial Code which was later section 237a and now is Title 28, section 1257(1) and (2) relating to appeals from state courts, it was said in *Murdock* v. *Memphis*, 20 Wallace (87 U. S.) 590: "It has been many times decided by this court on motions to dismiss this class of cases for want of jurisdiction, that if it appears from the record that the plaintiff in error raised and presented to the court by pleadings, prayer for instructions or other appropriate method, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this court attached, and we must hear the case on its merits."

F

The Questions Involved Are Substantial

There is no disputed question of fact. All of the facts involved are matters of record. A foreclosure action against real estate was pending in the state court. While it was pending a petition under 11 USC, section 203, was filed in the United States Court involving that real estate. While such a petition was so pending certain proceedings were maintained in the foreclosure action. The sole question is whether the appellant's title to that real estate can be conveyed away from him by the authority and validity of such proceedings, and whether those proceedings are subject to collateral attack.

The Constitution of the United States, the statute enacted pursuant to it and the decisions of this court clearly and

unequivocally make and declare such proceedings to be absolutely void utter nullities, as if never done and that they are subject to collateral attack.

The said proceedings were in clear, open defiance of the authority of the United States and the decisions of the state courts below are categorical challenges to the authority and supremacy of the United States, the Constitution of the United States, the laws of the United States and the decision of the Supreme Court of the United States.

There can not be one interpretation of the relation between state laws and the United States laws in Wisconsin and another interpretation in Ohio under the Constitution of the United States proclaimed by the people to be the "supreme Law of the Land" to which the judges in every state are thereby bound by oath, "any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding."

It is not a question of the mere *enforcement* of a *valid* state law but the enforcement of a state law made *invalid*, a "*nullity*", of "*no effect*," "absolutely void" (*Kalb* v. *Feuerstein*, 308 U. S. 433). It presents therefore a substantial question of the validity of the state law and the validity of the authority of the court officials. *Zucht* v. *King*, 260 U. S. 174, 177.

"The importance of preserving uniformity in the construction of the Constitution, laws and treaties of the United States must be felt by all; and the impracticability of maintaining this uniformity, unless the power of supervising all judgments in which the Constitution, laws or treaties of the United States may be drawn into question be vested in some single tribunal, is too apparent for controversy. The people of the United States have vested that power in this tribunal, and its highest duty is to exercise it with fidelity." *Davis* v. *Packard*, 8 Peters, (33 U. S.) 312, 323.

The jurisdiction reposed in the United States Supreme Court on appeal to review a decision of a state court is for the purpose of preventing "the courts of the several States from impairing or frittering away the authority of the federal government by giving a construction to its statutes adverse to such authority." *Missouri* v. *Andriano*, 138 U. S. 496, in the fourth paragraph from the end of the opinion.

". . . it is the duty of this court, in the exercise of its judicial power, to maintain the supremacy of the Constitution and laws of the United States" . . . *Harkrader* v. *Wadley*, 172 U. S. 148, 162.

"The appellate power, it will be observed, is conferred on this court in all cases or suits in which such a question" [concerning the Constitution and laws of the United States] "shall arise." . . . "And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every state; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a state and the United States, if there was no common arbiter authorized to decide between them." *Ableman* v. *Booth*, 21 Howard (62 U. S.) 506.

"In this Republic there is a dual system of government, national and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance, between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other." *In the Matter of Heff*, 197 U. S. 488, 505.

"On all questions arising under the Constitution and laws of the Union, this court may exercise a revising power;" [The Supreme Court of the United States did

so in the case of *Kalb* v. *Feuerstein*, 308 U. S. 433] "and its decisions are final and obligatory on all other judicial tribunals, State as well as federal. A State tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised." *Greene* v. *Neal*, 6 Peters (31 U. S.) 291, 298.

G

How the Federal Questions Were Raised

The federal questions were raised:

In the Court of first instance, the Common Pleas Court of Mercer County, Ohio, in the original petition and continued through intermediate revision by amendment to and in the Second Amended Petition (referred to by all parties generally as the Petition) and by arguments and briefing.

In the Court of Appeals of Ohio by Assignments of Error and in the briefs and argument on behalf of the appellant.

In the Supreme Court of the State of Ohio by assignments of error and by assignments of error and argument on behalf of the appellant.

In each of the three state courts the validity of the state laws was sustained as against the validity of the United States statute and the United States Constitution.

The following quotations support the foregoing statements:

From the Second Amended Petition (the "Petition"):

"On October 2, 1934, and prior thereto and continuously therefrom until the present the plaintiff has been and is the owner of the following described farm real estate which was his home, namely:"

* * * * * * *

"On said date, October 2, 1934, the plaintiff filed in the District Court of the United States for the Northern Dis-

trict of Ohio, at Toledo, in Case Number 11200 his petition as a farmer debtor, under Title 11, United States Code, Section 203, sub-sections (a) to (r), for the composition and extension of his debts and the said petition was by order of said United States Court approved and referred to a conciliation commissioner for administration. Thereafter on October 16, 1934 in the Common Pleas Court of Mercer County, Ohio, in a case entitled *The Peoples Bank Company* v. *Wenning*, No. 12534, which case had been pending on October 2, 1934, this said court purported to render a judgment and decree against this plaintiff for money and foreclosing a certain mortgage on said land. Thereafter this court purported to issue an execution on said judgment and decree. Said judgment decree, and execution were rendered and issued while said United States Court Case 11200 was pending and were wholly void and or no effect by the terms of said United States Statute, Title 11, United States Code, Section 203.

Said petition in said United States Court Case 11200 for composition and extension having failed of its purpose, this plaintiff thereafter on January 28, 1938, filed in said United States District Court in Case No. 14344 his petition as a farmer debtor under said Title 11, United States Code, Section 203, Subsections (a) to (r), for composition and extension of his debts and the said petition was by order of said United States Court approved and referred to a conciliation commissioner for administration.

Thereafter in said foreclosure Case No. 12534, which had been pending continuously in this court since its original filing, and while said case No. 14344 was still pending in said United States Court, and without any authorization by said United States Court, this court issued a purported order of sale and order of appraisement and a purported appraisement was made thereon. Said purported order of

sale and order of appraisement, said purported appraisement and return thereof were all wholly void and of no effect by the terms of said United States Statute, namely Title 11, United States Code, Section 203.

Said cause for composition and extension in Case 14344 proceeded to its completion, whereupon this plaintiff duly filed in said United States Court his Amended Petition under Title 11, United States Code, Section 203 (s), pursuant to which amended petition and said United States Statute said United States Court adjudicated this plaintiff a farmer debtor bankrupt and referred said Amended Petition to a conciliation commissioner for administration. Thereafter said conciliation commissioner duly issued and served upon the judge of this court, upon the sheriff of this county, and upon the attorney for the holder of the first mortgage upon real estate of the plaintiff, namely the Federal Land Bank of Louisville, a restraining order, restraining said judge, said sheriff and said land bank, from proceeding in this Common Pleas Court with said foreclosure case against this plaintiff and his farm real estate.

Notwithstanding the terms of said United States Statute, namely, Title 11, United States Code, Section 203, and notwithstanding the said restraining order, this court, and the sheriff of this county, illegally purported to sell and purportedly sold said real estate as if in foreclosure. Said purported sheriff's sale was void and of no effect.

Thereafter this court purported to confirm said void sale but said purported confirmation was wholly void and of no effect. Upon said purported sale and said purported confirmation of sale this court illegally dispossessed this plaintiff from his said real estate. Said sheriff executed and delivered a form of deed conveying said real estate to the purported purchaser at said void form of sheriff's sale, which deed was wholly void and of no effect as to this plaintiff."

From the "Memorandum" of the Judge of the Common Pleas Court:

"Mr. McClain on page 15, Item Fourteenth of his brief does not contend that the Court of Common Pleas at this time 47 days after Mr. Wenning's Petition had been dismissed by the Federal Court did not have jurisdiction and power but contended the Court's entry of December 17, 1938, to be void because there was nothing to sustain it.

In fact there was a previous valid order on June 26 finding for the Federal Land Bank, ordering Foreclosure, ordering appraisal and ordering sale.

All the intervening acts between January 26, 1938, and December 17, 1938, were ministerial procedural acts under the provisions of the Statutes of the State of Ohio which same Statutes provide (G.C. Sec. 11688) that the Court, as was done in this case on December 17, 1938, examine the proceedings of its officers, and if found to be in accordance with the statutes shall confirm same and order a deed.

If any of said ministerial acts validly ordered by the Court were irregular or void, do not the Ohio Statutory provisions which provide for the procedure provide that it is the Court of this State which shall make the determination as to the validity of those acts? Certainly the Common Pleas Court on December 17, 1938, had both the jurisdiction and the power to make the determination made and if the Court did not commit error the plaintiff was afforded due process of law by his right of hearing and his right to take the matter to the Court of Appeals on error. There has been no conflict in this case with either Federal Law or with the Constitution of the United States. This case was pending nearly five years in the Court of Common Pleas. The Court of Common Pleas made no order between January 28, 1938, and October 10, 1938. Under provisions of Ohio Law (G. C. Sec. 11690) the right of

redemption of the judgment debtor continued up to the time of the Court's order on December 17, 1938, and the possession of the plaintiff was not interferred with until after December 17, 1938, when in accordance with the order of December 17, 1938, a writ of possession was issued." . . .

"On December 31, 1941, nearly three years later, he filed the petition in this case now before the Court seeking to collaterally attack the aforementioned orders of the Court in Case No. 12534, none of which orders were made at a time when the plaintiff had a petition pending in Federal Court, and as to all of which plaintiff was afforded trial and right of direct attack appeal, as provided by law." (Note: It should be said that certain factual statements in the foregoing are not, in the opinion of counsel for appellant, supported by the evidence.)

In motions to Set Aside the Judgment and for a New Trial in the Common Pleas Court:

"9. The said order and decree of judgment is in violation of the Constitution of the United States and of the laws passed in pursuance thereof."

"11. The said finding, verdict or decision of the court is in violation of the Constitution of the United States and of the laws passed in pursuance thereof."

In the Court of Appeals of Ohio in Assignment of Error:

"1. The judgment violated the Constitution of the United States and the laws passed in pursuance thereof."

In the Opinion of the Court of Appeals of Ohio:

"The action is one in which the plaintiff seeks to have set aside as void, certain judgments rendered and proceedings had and conveyance of real estate authorized, in an action in the Court of Common Pleas of said county, wherein The Peoples Bank Company of Coldwater, one of the defendants herein, was one of the plaintiffs, and the plaintiff herein

was one of the defendants, the action being for determination of liens, the marshaling of liens, foreclosure of mortgage, and other equitable relief, and being Cause No. 12534 in said Court of Common Pleas."

"The appraisal, advertising for sale, and sale, of the real estate by the sheriff were not judicial acts, but merely ministerial acts, the performance of which was not inhibited, prohibited or precluded in any way by reason of the filing by plaintiff, of a new farmer-debtor petition on January 28, 1938. Said acts were therefore performed in due course of law.

The appraisal, advertising for sale, and sale of said real estate by the sheriff, not being judicial acts but merely ministerial acts, the Common Pleas Court, on December 17, 1938, being then free to fully exercise its jurisdiction in said foreclosure proceeding, had jurisdiction and power to render judgment confirming said sale, and its judgment may not be set aside in this action.

Furthermore, if said acts of the sheriff in the respects mentioned had been wholly void, the action of the court in confirming said sale was within its jurisdiction and power, and was not void but merely voidable, and subject to attack only through error proceedings resecuted from said judgment, and not by separate action such as the plaintiff seeks to maintain."

(Note: Certain statements in this opinion are also controverted.)

In the Supreme Court of the State of Ohio in Assignments of Error

"On Constitutional Questions

The Court of Appeals erred:

1. In failing to be bound by the provisions of the Constitution of the United States of America.

2. In failing to be bound by a statute of the United States of America, namely, Title 11, Section 203, U.S.C."

"On the Motion to Certify

The Court of Appeals erred:

1. In failing to be bound by the provisions of the Constitution of the United States of America.

2. In failing to be bound by a statute of the United States of America, namely Title 11, Section 203 USC."

No opinion was given out by the Supreme Court of the States of Ohio. The advance report of the decision of the Court is found in the June 5, 1950 issue of the "Ohio Bar" (Volume XXIII, No. 11) as 153 OS 583. This volume and page will be the official report and the text will appear in the official report of the decision as it now appears in the "Ohio Bar," namely:

Wenning v. *Peoples Bank*, 153 OS 583:

"Wenning, Appellant, v. The Peoples Bank of Coldwater, Ohio, et al., Appellees

Supreme Court—Dismissal—No debatable constitutional question involved—Conflict of law—Land foreclosure proceedings instituted in Common Pleas Court, September 7, 1934,—October 2, 1934, petition filed in federal court under farmer-debtor law—Section 203, Title 11, U. S. Code—Common Pleas judgment for P. bank, October 16, 1934—

Farmer-debtor proceeding terminated January 7, 1935—Farmer-debtor petition dismissed August 6, 1935—Common Pleas judgment for F. Bank and foreclosure January 26, 1938—Second farmer-debtor petition filed, January 28, 1938—Common Pleas order of sale and appraisal, January 31, 1938—Sale advertisement, February 10, 1938—February 24, 1938, Second farmer-debtor proceedings terminated February 24, 1938—Amended farmer-debtor petition filed March 2, 1938, and administration reference—Restraining order to Common Pleas Court, March 9, 1938—Second farmer-debtor petition dismissed, October 10, 1938—Sale, March 12, 1938—Confirmation of sale, December 17, 1938, Federal jurisdiction of bankruptcies—Section 8, Article I, U. S. Constitution—Federal judicial power where vested—Section I, Article III, U. S. Constitution—Supremacy of federal law—Section 7, Article XV, Constitution—Article VII, U. S. Constitution.

(No. 32075—Decided March 22, 1950).

APPEAL from the Court of Appeals for Mercer county.

Mr. Elmer McClain, for appellant.

Mr. Henry J. Knapke, Mr. Carleton Reiser and Mr. David Armstrong, for appellees.

It is ordered and adjudged that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C.J., MATTHIAS, HART, ZIMMERMAN, STEWART, TURNER AND TAFT, JJ., Concur."

The announcement of the denial of rehearing was reported in the "Ohio Bar" issue of April 17, 1950, (Volume XXIII, No. 4), on page 54, as follows:

"April 12, 1950."

"Rehearings denied."

"32075 Joseph G. Wenning, Appellant, v. The Peoples Bank of Coldwater, et al., Appellees. Mercer County."

Therefore the appellant, Joseph G. Wenning, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Title 11 USC 1257a (1) and (2).

Respectfully submitted,

ELMER MCCLAIN,
Attorney for Joseph G. Wenning,
Appellant.

Lima, Ohio.
June 30, 1950.